

FEDERAL CIRCUIT COURT OF AUSTRALIA

*SINGH v MINISTER FOR IMMIGRATION &
ANOR*

[2016] FCCA 1400

Catchwords:

MIGRATION – Judicial review of a decision of the Second Respondent – Skilled (Provisional) (Class VC) visa – subclass 485 visa – bogus document – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5(1), 359A, 360, 362B, 379A

Migration Regulations 1994 (Cth), reg. 1.03, Sch 2: cl. 485.224, Sch. 4: PIC 4020, 4020(1), 4020(4)

Cases cited:

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Sharma v Minister for Immigration, Multicultural Affairs and Citizenship [2014] FCCA 2821

Applicant:

RAVINDER SINGH

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:

MLG 457 of 2015

Judgment of:

Judge Hartnett

Hearing date:

17 May 2016

Delivered at:

Melbourne

Delivered on:

9 June 2016

REPRESENTATION

The Applicant: In Person

Counsel for the First Respondent: Ms Briffa

Solicitors for the First Respondent: Australian Government Solicitor

ORDERS

- (1) The name of the Second Respondent be changed to the Administrative Appeals Tribunal.
- (2) The application is dismissed.
- (3) The Applicant pay the costs of the First Respondent fixed in the sum of \$4,000.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 457 of 2015

RAVINDER SINGH

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. By application filed on 6 March 2015 the Applicant seeks judicial review of a decision of the Second Respondent ('the Tribunal') dated 12 February 2015. By that decision the Tribunal affirmed a decision of a delegate of the First Respondent, which refused to grant the Applicant a Skilled (Provisional) (Class VC) (subclass 485) visa ('the visa').
2. The grounds of application essentially go to the Applicant's lack of satisfaction with the Tribunal decision, which he believes is affected by error, albeit there is no particularisation as to that error and whether it is jurisdictional error. The Applicant also stated in his grounds of application that:-

“...I requested to provide me additional time so that I can collect more information in regards to my application but MRT refused my visa application on 12 Feb 2015...”

3. The First Respondent seeks dismissal of the application and that costs follow that dismissal.
4. By orders made on 10 June 2015 by Registrar Allaway the Applicant was required to file and serve any amended application with proper particulars of the grounds of application and written submissions by 12 April 2016. The Applicant has not filed any amended application nor any submissions or other material since the lodging of his application for judicial review.

Background

5. The background is as accurately described in the First Respondent's submissions. It is as follows:-

“2. The applicant applied for the visa on 19 April 2009. In the visa application, the applicant nominated his occupation as ‘Motor Mechanic’ and indicated that his skills had been assessed for that occupation by Trades Recognition Australia (TRA) on 29 July 2008. The applicant provided a copy of that skills assessment in support of his application. He also indicated that he had worked as a Motor Mechanic between 12 March 2007 and 27 April 2008 at Coburg Automatic Transmissions (Coburg Automatic), and provided a work reference letter from that mechanic. The reference letter stated that the applicant had more than ‘900 hours of unpaid work experience’ at Coburg Automatic.

3. On 16 July 2010, the Department of Immigration and Border Protection (the Department) wrote to the applicant and invited him to comment on information from a Departmental investigation into false work reference letters. The information indicated that the documents the applicant relied upon to support his visa application were fraudulently obtained. The applicant did not respond to that invitation.

4. On 4 January 2012, the Department wrote to the applicant again and invited him to comment on information that suggested he had provided fraudulent information in support of his visa application. Specifically, the letter explained that a person had pleaded guilty to the manufacture and sale of work experience records matching the reference letter the applicant had provided

with his visa application. The letter also attached a copy of Public Interest Criterion 4020 (PIC 4020).

5. On 21 March 2012, the applicant emailed the Department a statutory declaration in which he declared that he had 'genuinely attained 900 hours of experience from [Coburg Automatic]'.

6. On 10 August 2012, the Department sent a third invitation to comment to the applicant. Among other things, the invitation attached a statement made [by] the owner of Coburg Transmissions to the Australian Federal Police which indicated that the applicant had not worked at Coburg Automatic.

7. On 6 September 2012, the applicant provided a further statutory declaration to the Department indicating that he had worked at Coburg Automatic from 12 March 2007 to 27 April 2008.

8. On 21 September 2012, a delegate of the Minister refused to grant the visa because the applicant did not satisfy the requirements of cl 485.224 of Schedule 2 to the Migration Regulations 1994 (the Regulations), which required the applicant to meet the requirements of PIC 4020. The delegate found that there was evidence that the applicant had given, or caused to be given, a bogus document to the Department, and as the applicant had not raised any compelling or compassionate circumstances, decided not to waive the PIC 4020 requirements.

9. On 10 October 2012, the applicant applied to the Tribunal for review of the delegate's decision. A copy of the delegate's decision was provided with the application for review.

10. On 5 June 2014, the Tribunal wrote to the applicant pursuant to s 359A of the Migration Act 1958 (the Act) and invited him to comment on information that it considered would be part of the reason for affirming the decision. Namely, that his work reference letter was fraudulently obtained and provided to TRA by the applicant or on his behalf.

11. On 25 July 2014, after granting the applicant an extension of time to respond, the Tribunal received a response from the applicant reiterating that he had genuinely completed work experience at Coburg Automatic and stating that he would explain the details at a hearing.

12. On 10 November 2014, the Tribunal invited the applicant to a hearing before it on 15 December 2014.”¹

6. As contained in the Statement of Decision and Reasons (‘the Decision Record’) at paragraph 4, the Tribunal said:-

“...The applicant was advised that if he did not attend the hearing the Tribunal may make a decision without taking any further action to allow or enable him to appear before it...”

7. The Tribunal did not receive a response to the hearing invitation from the Applicant. On 8 December 2014 and 12 December 2014 the Tribunal sent reminder SMS messages to the mobile phone number that the Applicant listed in his review application form, reminding him of the time and date of the hearing. On Friday, 12 December 2014 the Tribunal received an email from the Applicant including a further statement from the Applicant. In the covering email it stated:-

“I am writing you in regards to my MRT application. I am sending you the statement in support of my application as an attachment. I request you to please consider my statement before making any decision on my application.”

8. There was no indication in the above referred to correspondence that Mr Singh intended to attend the hearing scheduled on 15 December 2014.

9. The Applicant did not appear before the Tribunal on the day and at the time and place which the hearing was scheduled on 15 December 2014. However, after the scheduled hearing time on 15 December 2014, the Tribunal received a further email from the Applicant. The Applicant sent the Tribunal a copy of the Federal Circuit Court decision in *Sharma v Minister for Immigration, Multicultural Affairs and Citizenship* [2014] FCCA 2821 and the Applicant noted that according to his research and study of the case, he believed that Public Interest Criterion 4020 (PIC 4020) did not apply to the TRA bogus skills assessment cases, and requested the Tribunal not impose the PIC 4020 requirement in his case.

10. On 22 December 2014 the Tribunal wrote to the Applicant, pursuant to s.359A of the *Migration Act 1958* (Cth) (‘the Act’), inviting him to

¹ First Respondent’s submissions filed on 3 May 2016 at [2]-[12].

comment on detailed information that it considered would be part of the reason for affirming the decision under review. In the letter the Tribunal noted that the Applicant did not attend the scheduled hearing before the Tribunal and that he did not provide any explanation as to why he did not attend the hearing. The letter stated that if the Tribunal did not receive a response before 19 January 2013, the Tribunal may make a decision without taking any further action to obtain the Applicant's views. The Tribunal received no response from the Applicant.

11. In the above circumstances and pursuant to s.362B of the Act, the Tribunal determined to make its decision on the review without taking any further action to enable the Applicant to appear before it.
12. On 12 February 2015 the Tribunal concluded that the decision under review should be affirmed.

The Tribunal decision

13. The Tribunal correctly identified the issue before it as being whether the visa applicant met PIC 4020 as required by cl.485.224 of the *Migration Regulations* 1994 (Cth) ('the Regulations') for the grant of the visa.

14. PIC 4020(1) is as follows:-

“(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5-reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

"information that is false or misleading in a material particular" means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

*Note: For the definition of **bogus document**, see subsection 5(1) of the Act.*

15. The term “bogus document” is defined in s.5(1) of the Act and is as follows:-

*“**“bogus document”** in relation to a person, means a document that the Minister reasonably suspects is a document that:*

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.”

16. PIC 4020(4) provides a discretion for the Minister to waive the requirements of PIC 4020(1) relating to bogus documents if satisfied that compelling circumstances affecting the interests of Australia or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen exists that justify the grant of a visa.

17. The Tribunal considered the investigation material relied upon by the delegate in refusing the visa, as well as the Applicant’s statutory declarations and other material provided to the Department and to it. The Tribunal, as described in paragraph 9 hereof, invited the Applicant to comment on material before it in accordance with s.359A of the Act. The Tribunal said at paragraphs 29 and 30 of its Decision Record:-

“29. After carefully considering the information above, the Tribunal finds that the statements in the work reference regarding Mr Singh working at Coburg Automatic Transmissions and the hours that Mr Singh worked at Coburg Automatic Transmissions were false or misleading. In reaching this conclusion the Tribunal placed greater weight on the information from the criminal investigation – in particular the statements of Mr Brasher that he did not employ anyone and that he did not employ

Mr Singh and that he did not write the work reference. Further the Tribunal accepts that Mr Amarante did enter into an arrangement with Mr Brasher to manufacture and sell work references and that one of the false work references was for Mr Singh. After consideration of the matters above the Tribunal reasonably suspects that the skills assessment reference number TRA 08/075215362 issued by the TRA on 29 July 2008 in respect of Mr Singh for the nominated position of motor mechanic was obtained because of a false or misleading statement in the work reference for Mr Singh. The Tribunal therefore finds that the skills assessment reference number TRA 08/075215362 issued by the TRA on 29 July 2008 is a 'bogus document' as defined in s.97(c) of the Act.

30. The Tribunal also finds, on 20 May 2009 Mr Singh caused to be given to an officer the bogus document in relation to the application for his Skilled (Provisional) (Class VC) (subclass 485) visa."

18. The Tribunal considered the decision in the Federal Circuit Court of *Sharma v Minster for Immigration, Multicultural Affairs and Citizenship* [2014] FCCA 2821 as provided by the Applicant but noted that recent authorities provided that it was immaterial in determining whether a document was bogus that the TRA had not been specified as a relevant assessing authority at the time that a skills assessment had been provided by a visa applicant to the Minister.
19. The Tribunal did not accept the Applicant's submissions that PIC 4020 did not apply to his case and concluded that it was not satisfied that there was no evidence that the Applicant had given or caused to be given to the Minister, an officer of the Department, the Tribunal or a relevant assessing authority a bogus document in relation to the application for a Skilled (Provisional) (Class VC) visa. Thus, the Tribunal was not satisfied the Applicant met the requirement of PIC 4020(1).
20. The Tribunal then proceeded to consider whether the requirements of PIC 4020(1) should be waived but noted there had been no specific submissions before it regarding the exercise of the waiver. The Tribunal had regard to information contained in the visa application and the information provided by the Applicant during the visa application and review application processes. The Tribunal noted the

Applicant was born in India and at the time of application was a single person. At the time of application the Tribunal noted his father resided in the United Arab Emirates and his mother and siblings resided in India.

21. The Tribunal further noted the Applicant had been in Australia since 2006 as a student and he completed his Diploma of Automotive Technology at the Melbourne Institute of Engineering in 2009 and a Certificate III in Automotive Mechanical Technology in 2008. Whilst the Tribunal considered the Applicant's circumstances to the extent it was able, the Tribunal was not satisfied that the Applicant's circumstances constituted compelling circumstances that affect the interests of Australia or constitute compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen as defined in reg.1.03 of the Regulations that justified the granting of the visa.

Consideration

22. The application for judicial review is without merit and shall be dismissed.
23. Contrary to the Applicant's complaint, as set out in his grounds of application, there was nothing on the Tribunal's file nor before the Tribunal or Court to indicate that the Applicant requested an extension of time from the Tribunal for the purposes of providing further material. Indeed, the emails sent by the Applicant to the Tribunal of 12 and 15 December 2015 did not contain any request for further time. On the evidence, it is clear that the Applicant was given ample opportunity to provide evidence and further evidence to the Tribunal and, indeed, did provide further evidence on more than one occasion.
24. The Tribunal's findings were open to it on the material and evidence before it, and no arguable grounds of judicial review of the Tribunal decision were put before the Court by the Applicant. The Applicant's submissions on the judicial review hearing were essentially a restatement of those matters that he put to the Tribunal. He sought merits review. That, of course, is not a matter for the Court.

25. The weight to be given to the Applicant's claims and the evidence was a matter for the Tribunal to assess as part of its fact finding function.² The Tribunal made findings of fact open to it on the evidence before it, and correctly applied legal authority.
26. The Tribunal invited the Applicant to appear before it to give evidence and present arguments in accordance with s.360 of the Act. The invitation was sent to the Applicant by one of the methods specified in s.379A of the Act, namely prepaid post to the last address for service provided in connection with the review. Given the totality of actions undertaken by the Tribunal, it had a discretion to proceed to make a determination on the papers pursuant to s.362B of the Act and appropriately exercised that discretion.
27. The Decision Record sets out the reasoning adopted by the Tribunal for its decision to proceed under s.362B, which was reasonable in the circumstances. Likewise, the Tribunal's decision set out its reasoning in respect of the application before it, and no error attends to that reasoning process.
28. The Court will dismiss the application and costs shall follow the event.

I certify that the preceding twenty-seven (27) paragraphs are a true copy of the reasons for judgment of Judge Hartnett

Date: 9 June 2016

²*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 281- 282.